Yong Chou Chuen v Ling Ming Sing & Anor

HIGH COURT (MIRI) — CIVIL SUIT NO 22-86 OF 2000 (MR)
ABDUL AZIZ JC
1 AUGUST 2003

Evidence — Adverse inference — Failure to call material witness — Whether adverse inference can be drawn against defendant — Evidence Act 1950 s 114(g)

Evidence — Burden of proof — Fraud alleged in civil cases — Defence elected submission of no case to answer — Whether burden is beyond reasonable doubt or prima facie

This was the plaintiff's claim for a declaration that he is the registered owner of land and for the return of its title. The plaintiff borrowed money from the first defendant. In consideration thereof the plaintiff deposited two issue documents of title ('IDT') for two pieces of land, ie Lot 2112 and Lot 2113 with the first defendant. The plaintiff also alleged that he executed in escrow two sets of Memorandum of Transfer ('MOT') in favour of the first defendant for the two pieces of land and these were kept at the solicitor's office of Jimmie Ting. Jimmie Ting was not called as a witness by the plaintiff. The terms of the borrowing, among other things, was that in the event the plaintiff was unable to pay back the loan, the two pieces of land would be transferred to the first defendant. If the loan was paid in full, then both titles to the land would be returned to the plaintiff. The plaintiff claimed that he had paid the loan in full to the first defendant but the first defendant only returned one IDT, ie IDT to Lot 2113. The plaintiff discovered that Lot 2112 had been transferred to the second defendant. The plaintiff alleged that the First and second defendants had perpetrated fraud on the plaintiff. The plaintiff caveated Lot 2112. The plaintiff also alleged there was a total failure of consideration. In his defence, the first defendant pleaded that the plaintiff did not repay the loan in full. The first defendant also denied any allegation of fraud, conspiracy or collusion. The first defendant also said that the MOT for the transfer of Lot 2112 to the second defendant was prepared by Jimmie Ting, an advocate, and for a consideration of RM30,000. The second defendant in her defence said that she was a *bona fide* purchaser and she paid cash for Lot 2112. The second defendant also counter-claimed against the plaintiff for removal of the caveat on Lot 2112 and for damages. At the end of the plaintiff's case, counsel for the First and second defendants elected to make a submission of no case to answer.

Held, dismissing the plaintiff's claim with costs and dismissing the second defendant's counter-claim:

(1) Had Jimmie Ting been called to testify for the plaintiff, the truth as to the documents may be known. It is the plaintiff's case. The plaintiff may choose the manner to conduct his case and decide what witness to call. But, if a material witness is not called to substantiate the plaintiff's allegation that is so central to the issue which the plaintiff is asking the court to decide in his favour, this failure to call that witness

may warrant the court to draw an adverse inference on the plaintiff had the evidence of the witness been called (see para 31).

(2) While I agree that, on the authorities, in civil cases fraud has to be proved beyond reasonable doubt, I will take the approach taken in a criminal proceeding in that I have to satisfy myself whether, at the end of the plaintiff's case where a submission of no case to answer was made, there is a prima facie case of fraud before making any ruling on a the submission of no case to answer (see para 37).

(3) The plaintiff need only prove prima facie fraud at the end of its case where no case to answer was submitted by the defence. The plaintiff has not discharged the burden of proving the facts and particulars of the alleged fraud and conspiracy (see paras 26, 37 and 48).

[**Bahasa Malaysia summary**

Ini adalah tuntutan plaintif untuk satu deklarasi bahawa dia adalah pemilik berdaftar bagi satu tanah dan untuk suratan hak milik tanah tersebut dipulangkan kepadanya. Plaintif meminjam wang dari defendan pertama. Sebagai balasan plaintif depositkan dua suratan hak milik (IDT) bagi dua tanah yang dikenali sebagai Lot 2112 dan Lot 2113 kepada defendan pertama. Plaintif juga menegaskan bahawa dia menandatangani secara eskrow dua set memorandum pindah milik kepada defendan pertama untuk dua tanah tersebut dan ia disimpan di pejabat peguam cara Jimmie Ting. Jimmie Ting tidak dipanggil sebagai saksi oleh plaintif. Syarat pinjaman tersebut adalah,antara lain, jika plaintif tidak dapat membayar balik pinjaman tersebut kedua-dua tanah tersebut akan dipindah milik kepada defendan pertama. Jika pinjaman tersebut telah dibayar balik dengan sepenuhnya, kedua-dua suratan hak milik akan diberi balik kepada plaintif. Plaintif menyatakan yang dia telah membayar balik pinjaman tersebut dengan sepenuhnya kepada defendan pertama tetapi defendan pertama hanya memulangkan satu IDT iaitu IDT kepada Lot 2113. Plaintif dapat tahu Lot 2112 telah dipindah milik kepada defendan kedua. Plaintif menegaskan bahawa defendan pertama dan kedua melakukan fraud terhadap plaintif. Plaintif memasukkan kaveat ke atas Lot 2112. Plaintif juga menegaskan terdapat kegagalan balasan. Defendan pertama dalam pembelaannya menegaskan plaintif tidak membayar balik pinjaman tersebut dengan sepenuhnya. Defendan pertama juga menafikan sebarang fraud,komplot atau persubahatan. Defendan pertama juga menegaskan memorandum pidah milik bagi Lot 2112 disediakan oleh Jimmie Ting seorang peguam cara dan balasannya adalah RM30,000. Defendan kedua dalam pembelaannya menegaskan bahawa dia adalah pembeli *bona fide* dan telah bayar tunai untuk Lot2112. Defendan kedua juga tuntut balas terhadap plaintif untuk mengeluarkan kaveat di atas Lot 2112. Selepas tamatnya kes plaintif peguam defendan-defendan telah memilih tiada kes untuk dijawab.

Diputuskan, menolak tuntutan plaintif dengan kos dan menolak tuntutan balas defendan kedua:

(1) Jika Jimmie Ting dipanggil untuk memberi keterangan bagi pihak plaintif, kebenaran mengenai dokumen mungkin boleh diketahui.Ia adalah kes plaintif. Plaintif boleh memilih cara untuk mengendalikan kesnya dan putuskan saksi yang mana hendak dipanggil. Tetapi jika satu saksi yang material tidak dipanggil untuk menyokong tuduhan plaintif yang penting kepada isu yang plaintif minta mahkamah ini putuskan bagi pihaknya, kegagalan ini yang tidak memanggil saksi tersebut mungkin membolehkan mahkamah membuat andaian bertentangan terhadap plaintif jika keterangan saksi tersebut diberi (lihat perenggan 31).

(2) Walaupun saya bersetuju mengikut otoriti dalam kes sivil, fraud harus dibuktikan melebihi keraguan munasabah, saya akan ambil pendekatan yang diambil di dalam kes jenayah iaitu saya harus berpuas hati sama ada, selepas tamatnya kes plaintif di mana tiada kes untuk dijawab dibangkitkan, terdapat kes fraud prima facie sebelum membuat sebarang keputusan bagi penghujahan tiada kes untuk dijawab (lihat perenggan 37).

(3) Plaintif hanya perlu membuktikan fraud prima facie selepas tamat kesnya bila tiada kes untuk dijawab dihujahkan oleh pembelaan. Plaintif gagal membuktikan fakta dan butir fraud dan persubahatan yang dituduhnya (lihat perenggan 26, 37 dan 48).]

Notes

For cases on adverse inference for failure to call witness, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 116–129

Cases referred to

Appoo s/o Krishnan v Ellamah d/o Ramasamy [1974] 2 MLJ 201 (refd)
Buang bin Mohamad v Awang Jimat bin Aivang Nook & Ors [1993] MLJ 239 (refd)
Chu Choon Moi v Ngan SewTin [1986] 1 MLJ 34 (refd)
Goh Ya Tian v Tan Song Gou & Ors [1981] 2 MLJ 317 (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86 (refd)
Jasbir Kaur & Anor v Tharumber Singh [1974] 1 MLJ 224 (refd)
Nanji & Co v Jatashankar Dossa 85 Ors AIR 1961 SC 1474 (refd)
Narayaran v Official Assignee, Rangoth AIR 1941 PC 93 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 AMR 169 (refd)
Ping Anak Layang v Jee Shik Chuong & Anor [1991] 2 MLJ 422 (refd)
PJTV Denson (M) Sdn, Bhd v Roxy (M) Sdn Bhd [1980] 2 MLJ 136 (refd)
Raghavamma v Chenchamma AIR 1964 SC 136 (refd)
Royal British Bank v Turquand [1856] 119 ER 474 (refd)
Sahari bin Morid v Hock Hua Bank Berhad & Yusuf bin Abang (unreported, Suit No K17 of 1978) (refd)
Saminathan v Pappa [1981] 1 MLJ 121 (refd)
Storey v Storey [1961] P 63, CA (refd)
UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)
Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101 (refd)

Legislation referred to

Evidence Act 1950 s 103
Sarawak Land Code (Cap 81) s 132, 134(1)

Tai Choi Yu (Tai Choi Yu & Co) for the plaintiff
Arthur Lee (Arthur CA Lee & Partners) for the first defendant
Kenny Yi (Yi & Co) for the second defendant

Abdul Aziz JC:

[1] The plaintiff claimed against the First and second defendants for the following reliefs:

- A declaration that the plaintiff is the registered proprietor of Lot 2112 situate in Lambir Land District.
- A rectification of the register at Miri Land Registry to show plaintiff as the registered proprietor.
- The return of original Issued Document of Title ('IDT') by the first defendant and second defendant to the plaintiff
- damages for fraud/breach of contract.

[2] The brief facts of the case are as follows: the plaintiff borrowed money on a piece-meal basis from the first defendant which the plaintiff claimed totalled RM220,000 from on or about 1996 for his hardware retail business. In consideration thereof the plaintiff deposited two (2) IDTs for two pieces of land, that is, Lot 2112 and Lot 2113 in the Lambir Land District with the first defendant. The plaintiff also alleged that he executed in escrow two (2) sets of Memorandum of Transfer ('MOT') in favour of the first defendant for the two pieces of land and these were kept at the solicitor's office of Jimmie Ting. The term of the borrowing, among other things, was that in the event the plaintiff was unable to pay back the loan, the two pieces of land would be transferred to the first defendant. If the loan is paid in full, then both titles to the land would be returned to the plaintiff. The plaintiff claimed that he had paid the loan in full to the first defendant, that is, the sum of RM220,000 through Bong & Co, Advocates. But the first defendant only returned one IDT through Mr Bong's office – ie the IDT to Lot 2113. On 25 August 2000, the plaintiff discovered that Lot 2112 had been transferred to the second defendant. The plaintiff alleged that the First and second defendants have perpetrated fraud on the plaintiff by the transfer of Lot 2112 to the second defendant. The plaintiff caveated the land (ie Lot 2112) on 30 August 2000 vide instrument L8544/2000 and registered it on 8 September 2000. The plaintiff also alleged collusion, connivance and conspiracy by the first defendant and the lawyers as to the transfer and that there was a total failure of consideration.

[3] In his defence, the first defendant admitted the depositing of two IDTs in respect of Lots 2113 and 2112 as security for the loan taken by the plaintiff. But the first defendant alleged that the total borrowing by plaintiff was in excess of RM220,000 and that the plaintiff did not execute the MOT

in blank. The first defendant also alleged that the plaintiff did not repay the loan in full. The first defendant further said that, upon payment of the sum of RM220,000, by the plaintiff, the first defendant partially withdrew the caveat which he had entered on both parcels of land to enable Lot 2113 to be returned to the plaintiff. The first defendant also denied any allegation of fraud, conspiracy or collusion. The first defendant also said that the MOT for the transfer of Lot 2112 to the second defendant was prepared by Mr Jimmie Ting, an advocate, and for a consideration of RM30,000.

[4] The second defendant in her defence said that she knows the plaintiff; but denied having any knowledge of dealings between the plaintiff and the first defendant. She further said that she was a *bona fide* purchaser and she had paid cash for Lot 2112, the amount of which was stated in the MOT. The second defendant also counter-claimed against the plaintiff for removal of the caveat on Lot 2112 and for damages.

[5] At the commencement of the hearing the following bundles were marked:

i. bundle of pleadings dated 20 May 2003 marked as 'Exhibit A'

ii. bundle of Agreed Documents dated 9 March 2002 marked as 'Exhibit B'

iii. bundle of Disputed Documents dated 27 May 2003 marked as 'Exhibit C'

The Evidence

[6] The plaintiff called four witnesses, namely the plaintiff himself (PW1), Bong Ah Loi (PW2) a lawyer, Joseph Chai (PW3) a professional valuer and Yong Kiam Yit (PW4), the purchaser of Lot 2113 who is also the brother of the plaintiff.

[7] In his testimony, PW1 (the plaintiff) said he knew the first defendantfirst defendant and had borrowed money from him on several occasions between 1996–1997. Each time PW1 said he borrowed an amount not exceeding RM10,000. PW1 testified that he deposited the two IDTs for Lots 2112 and 2113 which were kept in the first defendant's possession at the office of M/s Jimmie Ting & Co, Advocates, Miri and that in the event that PW1 failed or refused to settle the loan on demand or within a reasonable time upon demand or without demand, at the initiation of the plaintiff, the two lots shall be transferred to the first defendant. PW1 also testified that it was a term of the borrowing that if he settled the loans in full, the two titles to the land would be returned to him. PW1 also said in his testimony that when the account was finalised, the total amount he borrowed stood at RM220,000 inclusive of interest. But PW1 testified that he could not remember the date when he finalised his account with the first defendant. In his examination-in-chief, PW1 testified that there were two written agreements prepared by lawyer Jimmie Ting on the borrowings. PW1 testified that he had paid the first defendant RM220,000 and the repayment was acknowledged in two receipts (p 37 Exh. B – a receipt dated 14 October 1998 for RM210,000 and

p 38 Exh. B – a receipt dated 15 October 1998 for RM10,000). PW1 also testified that the payment was made on 14 October 1998 and 15 October 1998 respectively and it was made to the first defendant through lawyer Bong Ah Loi – PW2. PW1 also said in his testimony that he did not pay the money himself because he was hospitalised at Miri Hospital on those dates as evidenced by Exhibit P1. PW1 also testified that on both receipts the word 'part payment' was written and he did not know why. PW1 admitted in examination-in-chief that to secure the loans from the first defendant, he (ie PW1) deposited the titles to two (2) pieces of land with the first defendant – ie Lots 2112 and 2113 and these were kept in safe custody by lawyer Jimmie Ting. PW1 said he passed the two titles to the first defendant himself. PW1 testified that when he signed the MOT (p 36 of Exhibit B) it was blank. PW1 testified that he recognised the MOT at p 36 of Exhibit B and said that it was a form but PW1 said in his testimony that when he signed the MOT the particulars were not filled. PW1 also admitted signing the income tax declaration forms as to Real Property Gains Tax at pp 41–50 of Exhibit B relating to the disposal of the two pieces of land; but again PW1 said when he signed these forms they were blank, by that PW1 said he meant the particulars were not filled. When PW1 was shown documents at pp 8–17 of Exhibit B, which are the promissory notes, PW1 admitted his signature was on the documents but PW1 denied knowing their contents saying that the content were never explained to him. (In fact the documents at p 8–17 of Exh B – were promissory notes evidencing the amount borrowed by PW1 – totalling RM240,000). When asked by his counsel, PW1 said he cannot read English but he can understand a bit of English. PW1 also admitted that when he paid the first defendant the sum of RM220,000 per the receipts at pp 37 and 38 of Exhibit B, one of the titles to the said land, ie Lot 2113 was returned to him. In fact in his testimony PW1, the plaintiff, said that it was his brother PW4 who paid the money and that Lot 2113 was transferred to PW4.

[8] When his counsel showed him the MOT (at p 36 of Exhibit B) PW1 said he recognised it and in answer to a question by the Court, the plaintiff said he knew what a MOT is. PW1 also denied in his testimony that he ever received the sum RM30,000 for Lot 2112 or that he ever met the second defendant. PW1 testified that he discovered that Lot 2112 was transferred to the second defendant when he (ie PW1) wanted to pay the land rent sometime in June 2000. He then did a search and went to see a lawyer to commence this action. PW1 also entered a caveat on Lot 2112 (pp 24–25 of Exhibit B).

[9] Under cross-examination by counsel for the first defendant, PW1 said that the sum RM220,000 he paid to the advocate Bong Ah Loi (PW2) was the accumulated sum he borrowed from the first defendant together with interest. When he was asked about the particulars that were not filled in the promissory notes (pp 8 to 17 in Exhibit B) PW1 answered 'the date, amount, and also the particulars of land'. PW1 also said under cross-examination that when the title to Lot 2113 was returned (by way of transfer to PW4) he (PW1) did not ask PW2 about the title to Lot 2112. When further asked by counsel for first defendant, why he did not ask, the

plaintiff's answer was 'it was agreed between me and first defendant that the land title to Lot 2112 was to be retained by the defendant'. When the Court asked PW1 when it was agreed, PW1 answered that it was agreed 'two weeks before I made the payment'. The plaintiff also said under cross-examination that he did not complain to lawyer Bong Ah Loi (PW2) why the title to Lot 2112 was not returned to him. This fact of the agreement between the plaintiff and the first defendant, that the IDT to Lot 2112 was to be retained by the first defendant, was affirmed by plaintiff (PW1) on several occasions in answer to questions by counsel for the first defendant under cross-examination. The plaintiff also reaffirmed it under re-examination by his counsel. When PW1 was cross-examined by the second defendant's counsel, PW1 said he signed the MOT at p 36 of Exhibit B even though it knew it was blank. PW1 also testified under cross-examination by the first defendant's counsel that advocate Jimmie Ting did not explain the documents to him and he (PW1) also did not ask the advocate to explain them to him. Under cross-examination by counsel for the second defendant, PW1, the plaintiff, also denied that he ever received the sum of RM30.000 as payment of the purchase price for Lot 2112.

[10] From the testimony by the plaintiff (PW1) in examination-in-chief and under cross-examination and from the conduct of PW1 (as apparent in his testimony in court) as regards his dealings and loan transactions with the first defendant, I find that the plaintiff (PW1) knew what he was getting into and that he was also aware of the consequences of his actions. PW1 was a businessman. Under cross-examination by the second defendant, counsel PW1 testified that he had been a businessman for about 20 years; but he denied the suggestion by counsel that he was an experienced businessman. I find that fact difficult to comprehend. He is familiar with MOT's because he said so in his testimony. He said he knew what a MOT was. Therefore I find it hard to believe that with this kind of experience, and the arrangement PW1 made with the first defendant in this case, PW1 could not anticipate that he may lose his land, which titles he had deposited with the first defendant as security or collateral, when he signed a purported blank MOT in the event he did not pay the loans on time or when the demand was made on him. In my view PW1 knew and realised the risk and he took it.

[11] PW2 is an advocate. In his evidence in chief, PW2 says that on 1 October 1998, the first defendant, plaintiff and PW2 had a meeting at his (PW2's) chambers to discuss the account relating to the loans taken by the plaintiff (PW1) from the first defendant. PW2 testified that at the meeting PW1 and the first defendant agreed that the total loan taken was RM240,000 and PW2 was told that there were two pieces of land caveated and that PW2 was instructed that there would be a settlement for one of the pieces of land. PW2 also said that he noted the discussion and the notes were in his file. PW2 also testified that the plaintiff (PW1) mentioned to him (PW2) at the meeting that on payment of the loan 'by his (PW1's) brother Yong Kiam Kit (PW4), the land Lot 2113 was to be transferred to his(PWl)

brother'. PW2 also testified that the plaintiff did make payment on two occasions. The first payment was on 14 October 1998 for a sum of RM210,000, and the second payment was on 15 October 1998 for a sum of RM10,000. On both occasions PW2 said his office drew up the receipts as at pp 37 and 38 of Exhibit B and stated therein as part payment. PW2 testified that the receipts were prepared by his clerk and the words 'part payment' were written on the receipts on his instructions. In his examination in chief PW2 said he was in his office when the money was paid. PW2 also testified that the money was paid by PW4, the plaintiff's brother and, after the payment, Lot 2113 was transferred to PW4. PW2 also testified that the MOT for Lot 2113 at p 34 of Exhibit B was prepared by him. PW2 said that the plaintiff signed the MOT for Lot 2113 in his presence at the Miri hospital. According to PW2, the MOT for Lot 2113 was signed by PW4 in his presence in his office and then he, ie PW2, went to the hospital to get the plaintiff to sign the MOT. But PW2 said he could not remember whether he went to the hospital alone or together with PW4. PW2 said he remembered that the MOT was signed on 14 October 1998 but was presented for registration at the Land Office, Miri on 19 October 1998. For that reason, explained PW2, the MOT was dated 19 October 1998. PW2 also testified that after the transaction, he recalled meeting the plaintiff (PW1) on two occasions at his (PW2's) office. One occasion was when PW1 came to his office to discuss the possibility of filing a claim against the insurance company for a fire that broke out at PW1's shop. According to PW2, that meeting was a few months after the transaction. The second occasion was when PW1 came to PW2's office to sign a document as a guarantor in respect of a different transaction. On both occasions, according to PW2, the issue of the borrowing was not discussed.

[12] Under cross-examination by counsel for the first defendant, PW2 said that the plaintiff and the first defendant came to his chambers to finalise the outstanding loan and PW2 confirmed that the instruction given to him then was that there would be a settlement of one of the two pieces of land. PW2 also said he came to know about total loan of RM240,000 when he was shown some documents which looked like promissory notes at the meeting with the plaintiff and the first defendant in his chambers and which he (PW2) perused briefly. PW2 also said that the plaintiff agreed that the sum owing was RM240.000 and that the plaintiff suggested that the part payment was for one of the pieces of land. PW2 also testified under cross-examination that the plaintiff instructed him to transfer one piece of the land, ie Lot 2113 to PW1's brother Kiam Kit (PW4) upon payment of RM220,000 by PW4. When PW2 was referred to the two receipts at pp 37 and 38 of Exhibit B, PW2 said the reason 'part payment' was stated in the receipts was because it was not full payment of the total sum owed. PW2 also said that after the payment of RM220.000 by the plaintiffs brother PW4, he did a partial withdrawal of the caveat over the two Lots to release Lot 2113 which was to be transferred to PW4.

[13] PW2 testified that when he filed the MOT for Lot 2113, he also filed the instrument of partial withdrawal of caveat at pp 28, 29 and 30 of Exhibit B

which was prepared by Jimmie Ting, an advocate. PW2 testified in his examination-in-chief that he did not know how the balance of the loan (after the payment of RM220,000) was to be paid. There was no discussion on it.

[14] When PW2 was re-examined by counsel for the plaintiff as to how the plaintiff acknowledged the total amount was RM240,000, PW2 said that the first defendant took out some documents and mentioned that the total amount was RM240,000 and Mr Yong (ie the plaintiff) agreed with the figure. When counsel for the plaintiff again asked PW2 whether he heard the first defendant mention the figure, PW2 affirmatively answered 'I heard it'.

[15] The next witness to give evidence for the plaintiff was PW3. He is a registered valuer and was called by the plaintiff to prepare a valuation report P2 as to the value of Lot 2112 and PW3 testified that he valued the land at RM92,300. PW3 testified that he was approached by the plaintiff on 22 May 2003 to do the valuation report. PW3 also testified that the valuation report P2 was for information only as to the market value of lot 2112 on 6 Janaury 2002.

[16] PW4 testified that he is the brother of plaintiff. PW4 said he was asked by the plaintiff to pass the money to Mr Bong (PW2) and the money, RM220,000, was the consideration of the land Lot 2113. To a question by counsel for the plaintiff, PW4 answered 'Yes, the RM220,000 was for the purchase of Lot 2113, which I took and paid to Mr Bong'. When PW4 was shown the documents at pp 37 and 38 of Exhibit B, PW4 confirmed that these were receipts for the payment of the total sum of RM220,000 and that the receipts were issued to him (PW4). PW4 also testified that he had no idea about the loan taken by the plaintiff from the first defendant. When cross examined by counsel for the first defendant on the receipts, PW4 said he did not pay attention to the wording on the receipt.

[17] At the end of the plaintiff's case, counsel for the First and second defendants elected to make a submission of no case to answer.

[18] There are two sets of circumstances under which a defendant may submit that he has no case to answer. In one instance, the defendant may submit that accepting the plaintiff's evidence at its face value, no case has been established in law. The other instance is that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find the burden of proof has not been discharged (see *Storey v Storey* [1961] P 63, CA).

[19] The Court cautioned counsel for the First and second defendants that they would not be allowed to call any evidence if the Court ruled against them in their submission of no case to answer. In *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4, Sinnathuray J said at p 4 as follows:

> It is not often realised that in civil cases, as much as in criminal cases, a party must prove his case before the burden shifts to the other side. In a criminal case the prosecution's burden is a heavy one. In a civil case, it is on a balance of probabilities, But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.

and at p 5 the learned judge said:

> In my judgment, it would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiff's case, without putting the defendant to his election, whether to call evidence or not, if his submission fails.

[20] However, the above view as regards the election to be given to counsel making a submission of no case to answer was not followed in *Goh Ya Tian v Tan Song Gou & Ors* [1981] 2 MLJ 317. At pp 319–320 of the report Lai Kew J said:

> In my view if a judge is asked to rule at the end of the plaintiff's case that the plaintiff has made out no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence.

[21] In my opinion, the better view is that counsel for the defendants should be cautioned on the consequence of making a submission of no case to answer and that he should be put to his election. Both counsel understood the caution and insisted on making a submission of no case to answer by the First and second defendant.

[22] Counsel then requested for time to submit written submissions. The Court then adjourned the matter to 1 August 2003 for decision.

Issues and Finding

[23] The first issue is to establish the nature of the arrangement as to the loans taken by the plaintiff from the first defendant as regards the two pieces of land namely Lot 2112 and Lot 2113. PW1's testimony clearly shows that, at the request of plaintiff, the first defendant advanced money to the plaintiff on several occasions. As security for the advances, the plaintiff deposited two titles Lot 2113 and 2112 with the first defendant and executed certain documents related to the transfer of the said land to the first defendant in the event the money advanced was not paid on demand. These facts are not disputed or challenged. No evidence was adduced as to the payment of any interest on the loans or the rate of interest to be paid on the loans by the plaintiff. But in PW1's testimony, PW1 did say that when he settled the loan in full it was inclusive of the interest. Furthermore the issue of interest was not pleaded by the plaintiff, Although the first defendant in his Statement of Defence stated that he was a licenced money lender, the plaintiff's counsel makes no issue out of it either in his pleadings or his submission in so far as the loans are concern.

[24] The next issue of crucial importance is to determine what was the final sum owed by plaintiff to the first defendant? I find that there are two versions. The plaintiff said it was RM220.000 but PW2 said RM240,000. On the evidence of PW2, which I have alluded to earlier, I prefer PW2's version that the final sum owed was RM240,000. This was not seriously challenged.

[25] Was there fraud on the First plaintiff? I find there was none. PW2's evidence clearly shows that after the finalising of the account, the first defendant and the plaintiff agreed that the sum was RM240,000 and that upon payment of RM220,000 by PW4, the plaintiffs brother, the defendant

would release one of the titles to PW4. This was done and PW2 made all the arragements to transfer Lot 2113 to PW4 and also to withdraw the caveat partially. The receipt issued (at p 37 and 38) by PW2 shows part payment. So there was a balance. There is also evidence that the plaintiff agreed that the title to Lot 2112 was to be retained by the first defendant.

[26] The central issue to the plaintiff's case is fraud. Therefore the plaintiff has to prove, and the standard of proof on the authorities, is beyond reasonable doubt. The plaintiff has not discharged this burden.

[27] The evidence on which the plaintiff relied to prove fraud, in my view, is that he (the plaintiff) had signed blank documents and that these documents were in the English language and that these documents were not explained to him (the plaintiff). However the plaintiff did say in his examination-in-chief that these documents were prepared by one Jimmie Ting, an advocate.

[28] If one is to look at Exhibit B, the agreed Bundle, there are only two categories of documents which have the plaintiff's signature on them and are admitted by plaintiff. The first category is the promissory notes at pp 8–17 of Exhibit B. The second category is the MOT and the payment voucher at pp 36 and 39 of Exh. B respectively.

[29] When the plaintiff said he signed blank documents, the plaintiff testified that he meant the particulars were not filled in.

[30] But the plaintiff did not call Jimmie Ting to testify to corrobate his allegation that the documents were blank when he put his signature on them and that the documents were not explained to him. No reason was given as to why Jimmie Ting, the advocate, could not be called to give evidence. Since the plaintiff asserted that the documents were blank and not explained to him, the plaintiff must prove this. Section 101 of the Evidence Act 1950 provides that he who assets must prove.

[31] Counsel for the first defendant submitted that if Jimmy Ting were to testify, his evidence could be adverse to the plaintiff. In the circumstances, I agree that had Jimmie Ting been called to testify for the plaintiff, the truth as to the documents may be known. It is the plaintiff's case. The plaintiff may choose the manner in which to conduct his case and decide what witnesses to call. But if a material witness is not called to substantiate the plaintiff's allegation that is so central to the issue which the plaintiff is asking the court to decide in his favour, this failure to call that witness may warrant the court to draw an adverse inference on the plaintiff had the evidence of the witness been called.

[32] 'Fraud' means actual fraud; and whether it exists in a given situation or circumstances is a question of fact. In *PJTV Denson (M) Sdn, Bhd v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 at p 138 Raja Azlan Shah CJ (Malaya) as he then was said:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case decided case only illustrative of fraud. Fraud must mean 'actual fraud ie dishonestly of some sort for.

[33] His Lordship then cited an English decision *of Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106 where it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent'.

[34] The burden of proof for fraud, whether in criminal or civil cases, is beyond reasonable doubt. In *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34, Syed Agil Barakbah SCJ said at p 38:

> We agree that fraud, whether made in civil or criminal proceedings, must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayaran v Official Assignee, Rangoth* AIR 1941 PC 93; *Saminathan v Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence in the circumstances of the particular case. If such proof extends only to a possibility then it falls short of proving beyond reasonable doubt.

[35] The plaintiff's solicitor, on the other hand, submitted that on the authorities it would seem that in Malaysia the standard of proof of fraud in a land case is on the balance of probabilities as in all other cases of civil fraud. plaintiff's counsel relies on the case of *Buang bin Mohamad v Awang Jimat bin Aivang Nook & Ors* [1993] MLJ 239. Counsel for the plaintiff also submitted that at the stage of no case to answer, the onus to prove is upon the plaintiff, but the test is not whether the plaintiff had proven fraud on the balance of probabilities or beyond reasonable doubt, but rather, whether the plaintiff had proven a prima facie case of fraud. Counsel for the plaintiff further submitted that once a prima facie case of fraud has been established by the plaintiff, the burden of proof shifts to the defendants to rebut the plaintiff's case to show the absence of fraud.

[36] A prima facie case, in my view, is a case where there is sufficient evidence and which is not inherently incredible that would warrant the Court to hear the defence's side of the story. In my view also, the same principle is true in civil as well as criminal proceedings. The trend in criminal cases nowadays is that at the end of the prosecution case, the court has to satisfy itself that there is prima facie case, that is to say there is sufficient evidence not inherently incredible, before the defence is called. Then at the end of the case, after the defence has been called, there shall be re-evaluation of the evidence and at this stage the court has to satisfy itself that the prosecution has proved its case beyond reasonable doubt. But before the court comes to this second stage, the court has to be satisfied as to the first threshold test of a prima facie case.

[37] While I agree that, on the authorities, in civil cases fraud has to be proved beyond reasonable doubt, I will take the approach taken in a criminal proceeding in that I have to satisfy myself whether, at the end of the plaintiff's case, where a submission of no case to answer has been made, that there is prima facie case of fraud before making any ruling on the submission of no case to answer. I take this approach because I am of the view that the burden of proof on the standard of beyond reasonable doubt can only be discharged

on the evaluation of the totality of the evidence. Furthermore, the cases cited to me to show that the standard of proof in civil fraud cases is beyond reasonable doubt, are all cases in which the defence had given evidence. It must be remembered that in a criminal case, the burden to prove a case rests on the prosecution throughout the case. This burden is the burden of proof of beyond reasonable doubt. Therefore, if the same standard of proof is required to prove fraud in civil cases, then the same principle should apply in civil cases, that is, while the burden is on the plaintiff throughout to prove fraud, the plaintiff need only prove prima facie fraud at the end of its case where no case to answer was submitted by the defence.

[38] In this instant case, the plaintiff submitted that he had established a prima facie case of fraud against the defendants. The plaintiff relied on evidence by PW2 and PW4 which the plaintiff submitted established the fact that RM220,000 was paid to the first defendant in full, and this has not been challenged. However PW2's evidence is that the total sum owed by the plaintiff to the first defendant was RM240,000. PW2 also testified that when his office issued the receipt for the total sum of RM220,000 paid by PW4, it was stated on the receipts that it was a part payment. This evidence was not challenged or contradicted.

[39] The plaintiff's counsel relied on the case of *Appoo s/o Krishnan v Ellamah d/o Ramasamy* [1974] 2 MLJ 201, where a money lender who later died managed to register a transfer of land to himself under a moneylending transaction secured by a power of attorney to the said land. In that case, the court held that the title was defeasible despite the said registration which was also held to have been obtained by fraud and by means of an insufficient or void instrument. But the *Appoo* case in my view is distinguishable from the instant case in that in *Appoo*, it related to a money lending transaction under the Moneylenders Ordinance and the court was concerned with whether the agreement in that case constituted a note or memorandum for the purposes of s 16 of the Ordinance; and which the court found was not so. In the instant case, money lending under the Moneylenders Ordinance was not even pleaded.

[40] Learned counsel for the plaintiff also cited the case of *Jasbir Kaur & Anor v Tharumber Singh* [1974] 1 MLJ 224 to advance his argument on fraud. Again, in that case the trial judge found there was evidence of fraud in that there was misrepresentation as to the authority to proceed with the registration of the land and a false declaration as to the loss of the land grant. Nothing of that sort can be found in evidence in the instant case. In any event, these material facts as to misrepresentation and false declaration were also not pleaded by the plaintiff in the statement of claim.

[41] Under s 132 of the Sarawak Land Code (Cap 81)('the Code'), it is stated that the registered proprietor of any estate or interest in land, except in the case of fraud, holds such estate or interest free from all other interests except those stated in that section; and s 134(1) of the Code provides that any issue document of title or entry or alteration in the Register procured or made by fraud shall be void as against any person defrauded or who may be

defrauded, and no person who is a party or privy to the fraud, or who claims solely as volunteer under such person, shall take benefit therefrom. The effect of these provisions was discussed in *Ping Anak Layang v Jee Shik Chuong & Anor* [1991] 2 MLJ 422 where Haidar J (as he then was) ruled that fraud means actual fraud. Likewise, in the unreported case of *Sahari bin Murid (A) Sahari Bin Morid v Hock Hua Bank Berhad & Yusuf Bin Abang* (unreported, Suit No K17 of 1978) it was also held that under s 134(1) of the Code, fraud means actual fraud.

[42] Therefore, in this instant case, I find that there is a mere allegation of fraud but there is no evidence to sustain it. The pleadings are also silent as to the fact that the document signed by the plaintiff was blank and that the contents were not explained to him (the plaintiff). These are material facts and should have been pleaded.

[43] As against the second defendant, learned counsel for the plaintiff also submitted that there was no consideration or there is a total failure of consideration as to the sale of Lot 2112. It was submitted that the plaintiff did not receive the sum of RM30,000 and that the plaintiff would not have sold Lot 2112 for RM30,000 when Lot 2112 was valued at more than RM90,000 by PW3 in his valuation report in P2. It is to be noted that the fact that the plaintiff would have never entered into a sale agreement of Lot 2112 for RM30,000 was never pleaded. It was also not pleaded that the value of Lot 2112 was at more than RM90,000 as valued by PW3. Indeed PW3 was approached by the plaintiff only on 22 May 2003 to prepare the valuation report in P2; that was after the trial of this case had commenced. In my view, this was an afterthought by the plaintiff to support his claim on the issue of total failure of consideration. There is also the evidence of the payment voucher at p 39 of Exhibit B, the Agreed Bundle, which shows that the second defendant paid the sum of RM30,000 for Lot 2112; and the voucher had the plaintiff's signature on it. This was admitted by the plaintiff in his examination-in-chief when he was shown the voucher and was asked to identify the signature appearing on the voucher. The payment voucher at p 39 of Exhibit B carries the letter head of Jimmie Ting & Co, Advocates. It is obvious that the payment of the money was done through the advocate. It is also evidenced from the payment voucher that the payment was in cash. In the circumstances I find no merit in this submission.

[44] Learned counsel for the plaintiff also submitted that if the second defendant in her defence asserts that she is a *bona fide* purchaser without notice, then it is for her to prove her assertion under s 103 of the Evidence Act 1950. Counsel for the plaintiff cited a Federal Court case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 in which, at p 499, the Court, on the question of whether a person is necessarily disqualified from being a *bona fide* purchaser for value if he had not paid the purchase price in full, said:

> The onus was, of course, upon the Interverner/Purchaser that it was a *bona fide* purchaser for value for this would be a matter peculiarly within its own knowledge.

[45] Whilst the above principle is correct, in my view the facts in *Pekan Nenas Industries Sdn Bhd* cited by the plaintiff's counsel are distinguishable from the present case. In that case the appellant/Intervener bought six lots of land (in that case collectively they were referred to as 'the disputed properties') belonging to a family company which was beset with family squabbles and had not paid the full purchase price. The respondent in that case was trying to nullify and set aside the sale on the ground that there was no proper resolution by the company to authorise the sale. On the other hand the Appellant/Intevener argued that he was an outsider and he invoked *Turquand's* rule (see *Royal British Bank v Turquand* [1856] 119 ER 474) in that he, in the circumstances of that case, need not enquire into the regularity of the internal affairs and proceedings of the company and may presume that all is being done in a regular way. In the instant case however, the plaintiffs evidence is that he never knew or met the second defendant, although the second defendant in her statement of defence pleaded that she knows the plaintiff but had no knowledge of any transaction between the plaintiff and the first defendant. Furthermore, it is an undisputed fact that the plaintiff had surrendered the title to Lot 2112 to the first defendant as one form of collateral for the loan that the plaintiff had taken from the first defendant on the understanding that the land would be transferred to the first defendant if the plaintiff could not repay the loan in full. I have found as a matter of fact that the plaintiff did not pay back the loan in full. There was still an outstanding sum. Thus, it is my view, given that circumstances, that it is implicit in the terms of arrangement between the plaintiff and the first defendant that the first defendant may cause the transfer of Lot 2112 to himself or to such other person that he desired to realise the unpaid balance of the loan taken by the plaintiff. The second defendant also had paid the full purchase price.

[46] In *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86, Salleh Abbas FJ (as he then was) said:

> For the purpose of this appeal, it is necessary to bear in mind the distinction between the two senses in which the expressions 'burden of proof' and 'onus of proof' are used (*Nanji & Co v Jatashankar Dossa 85 Ors* AIR 1961 SC 1474, 1478 and *Raghavamma v Chenchamma* AIR 1964 SC 136 at 143). The first sense, signified by the expression 'burden of proof' such as referred to in s 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* 7th Ed paras 351 and 354). The second sense referred to as 'onus of proof', on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus, as opposed to burden, is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates.

[47] In the instant case, the plaintiff still has to prove his case against the second defendant before the second defendant is called upon to explain away her claim of being a *bona fide* purchaser. In the instant case, the question to ask is: what is the case against the second defendant that the

plaintiff needs to prove. On the pleadings in the statement of claim, it seems to me the case against the second defendant is grounded on fraud and conspiracy. In view of my earlier finding that the plaintiff has not discharged the burden of proving the facts and particulars of the alleged fraud and conspiracy by the second defendant, the burden of proving herself a *bona fide* purchaser therefore has not shifted to the second defendant. In his reply to the second defendant's defence and counter-claim, the plaintiff pleaded only bare denial of the second defendant as a *bona fide* purchaser and the receipt of the purchase money.

[48] For the above reasons therefore, the plaintiff's case against the defendants is dismissed. Costs to both the defendants is awarded. I also dismiss the counter-claim by the second defendant since no evidence was adduced to prove the counter-claim. No order as to costs in respect of the counter-claim is made.

Plaintiff's claim dismissed with costs and Second Defendant's counter claim dismissed.

Reported by AG Kalidas